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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 11

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARLE CRANK,
T. S. WINSTON, and
W. R. DUNKUM, Petitioners,

v.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent

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BRIEF OF RESPONDENT.

To the Honorable Chief Justice and Associated Justices of the Supreme Court of the United States:

FACTS.

This hearing is limited to question of whether the District Court had jurisdiction of the defendants, in the court below and petitioners in this court. Therefore, only those facts showing how the court acquired jurisdiction of the petitioners are relevant. The proceeding was instituted by notice of motion in accordance with the Virginia statutes as stated by counsel for petitioners on page 2 of his brief and four of the five petitioners filed pleas in abatement and motions to dismiss, but no plea in abatement or motion to dismiss was filed by T. S. Winston (R. 4-8). All of the statement of facts in regard to subsequent pro-

ceedings leading up to and during the trial are immaterial. The pleas in abatement and motions to dismiss were on the following grounds:

1. No process can issue out of a federal court under Section 721 of the Judicial Code of the United States unless under the seal of the court and signed by the clerk.

2. No persons except those voluntarily appearing can be made parties defendant in a federal court so as to get a personal judgment against them unless served with process issued under Section 721 of the Judicial Code.

3. This action was commenced without process under the seal of the court and signed by the clerk, and that therefore the court acquired no jurisdiction over the person of the petitioners.

4. That Section 724 of the Judicial Code, known as the Conformity Act, has no application to proceedings to collect an assessment on stock in a national bank.

It is conceded that *process issuing from a federal court* must be under the seal of the court and signed by the clerk and that no process issued from a court to institute this action.

QUESTIONS.

Three questions are therefore presented for determination:

1. Is a writ issuing from a court necessary to commence an action at law?

2. Is the notice of motion by which this action was begun a writ within the meaning of Section 721 of the Judicial Code?

3. Does Section 724 of the Judicial Code apply to actions to collect an assessment levied by the Comptroller on stockholders in a national bank?

We will discuss these in the order named.

IMPORTANCE OF QUESTIONS.

This procedure is used in 14% to 95% of cases in federal courts in Virginia. Eley v. Gamble, 75 Fed. (2d) 171, 173. Ninety percent of Federal cases at Abingdon and fifty-four out of fifty-five at Norfolk (36 West Virginia Law Quarterly, 82, where excellent tables are given, pages 72-82 on extent of use of notice of motion). If a writ is necessary to commence an action most default judgments in the Virginia State courts and federal courts in Virginia and many other states are void. Section 106 of Virginia Constitution provides:

> "Writs shall run in the name of the 'Commonwealth of Virginia,' and be attested by the clerks of the several courts. Indictments shall conclude 'against the peace and dignity of the Commonwealth.' "

The constitutions of many other states have similar requirements. It has been uniformly held that they have no application to proceedings by notice of motion and that such proceeding may be instituted without writs. If these notices are writs or writs are necessary to commence such actions, then all default judgments in such proceedings are void. These proceedings are also used in many other states. It is very similar to the procedure recommended in "Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia," prepared by the Advisory Committee on Rules of Civil Procedure Appointed by the Supreme Court of the United States. See Rule 4, page 7.

This procedure is the oldest code pleading in an English speaking country. It is more than two centuries old, more than half a century older than the United States. It was authorized by Acts of May, 1732, c. 10, sec. 8, 4 Va. Stat.

(Hening) 352 and extended and enlarged, eight times before 1800. It was enlarged by 1832 to cover twenty-five classes. Robinson Practice (1832 ed.) 589-621.

This is the simpliest procedure known in the United States. It has worked well in Virginia for more than two hundred years and in other states which have copied our procedure. See "Summary Civil Procedure", 38 Yale Law Journal 193, 423, also report 36 West Virginia Law Quarterly 1, 82. It would be unfortunate indeed if we were to lose the oldest and most successful simplified procedure, which has been developed during over two centuries.

NATURE OF PROCEDURE.

Section 6046 of the Code of Virginia authorizing this procedure will be found on pages 60-61 of the appendix.

This procedure and its history, are well described by Robert Wyness Millar of the Yale Law School in 38 Yale Law Journal 193, 215, from which we quote as follows:

"The manner of proceeding here in question seems to have had its origin in Virginia. As early, at least, as 1732,[116] statutes begin to appear in this jurisdiction providing for summary judgment on motion against sheriffs and other officers failing to pay over public moneys to the proper recipient. In 1748, it was enacted, with reference to forthcoming bonds given on execution, that such a bond should have the force of a judgment and, if not paid, the court was empowered, 'upon motion of the party to whom the same is payable, to award execution thereupon, with

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116. Acts of May, 1732, c. 10, sec. 8, 4 Va. Stat. (Hening) 352. This act relates to the failure of the sheriff to account to the secretary of the colony and the clerk of the county court for fees coming to his hands. Numerous later statutes prescribe the same remedy in respect of collecting officers failing to pay over the proceeds of taxes and duties. E. g., 1756, 7 Va. Stat. (Hening) 12; 1759, ibid. 263; 1761, ibid. 396; 1762, ibid. 542; (1769) 8 Va. Stat. (Hening) 346; (1775) 9 Va. Stat. (Hening) 67; 1776, ibid. 222; cf. Acts of October, 1705, c. 9, sec. 9, 3 Va. Stat. (Hening) 266.

costs; provided the obligors have ten days notice of such motion.'[117] In 1753, the sheriff or other officer failing to return an execution is subjected to a fine for the benefit of the judgment-creditor, recoverable by motion for judgment upon 'ten days' previous notice of the motion for judgment for such fine.'[118] And in 1786 occurs the most noteworthy provision—forerunner of many statutes of the same kind—that the surety who has paid a judgment rendered against him for the principal's debt may proceed against the principal by motion for judgment to recover the amount so paid.[119] The same law extends the remedy also to the case of one surety, who has thus had judgment rendered against him, and is now seeking contribution from a co-surety, where the principal has become insolvent.[120] Again, in 1787, the proceeding is made available to a client for the recovery of money wrongfully withheld by an attorney.[121] It is not here in place to review in detail the progress of this legislation; suffice to say that as time went on the remedy was applied to other situations with such generosity that the first edition of Robinson's Practice (1832) enumerates some twenty-five categories in which it is at a plaintiff's command.[122] With respect to the proceeding itself, the author observes:

> 'In various cases the legislature have authorized judgment to be entered and execution to be awarded, upon motion, in a summary way . . . In giving these summary remedies, the legislature always provide that the party proceeded against shall be given notice of the motion, for ten days, or some reasonable time . . . In motions upon forthcoming bonds and replevy bonds, it is very common to give notice ore tenus. In other motions it is usual for the plaintiff to

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117. Acts of October, 1748, c. 12, sec. 14, 5 Va. Stat. (Hening) 534.
118. Acts of November, 1753, c. 1, sec. 25, 6 Va. Stat. (Hening) 344.
119. Acts of October, 1786, c. 15, secs. 1, 2, 12 Va. Stat. (Hening) 268.
120. Ibid. sec. 3.
121. Acts of October, 1787, c. 10, sec. 3, 12 Va. Stat. (Hening) 473.
122. Pp. 589-621.

write a notice to the defendant, of the intended motion; and this written notice is returned to the court in which the motion is made, with an affidavit shewing that a copy thereof has been duly delivered.' [123]

"As it was in Virginia that the proceeding had its inception, so it was here that it took on an entirely new significance. This occurred in 1849, at the instance of the revisers whose labors culminated in the Code of that year. In their report they informed the legislature, that

'by this mode of proceeding, all claims of the Commonwealth, and a large number of those individuals are now recoverable; yet a formal point scarcely ever arises upon a motion. The case is very generally decided upon its merits. A brief notice serves the double purpose of a writ and a declaration; and though a defendant is not precluded from pleading, yet as the case can be heard without pleading, pleadings are in fact very rarely filed. Seeing that this mode of proceeding has worked well in the cases in which it has been heretofore allowed, it seems to us advisable to extend it to all cases in which a person is now entitled to recover money by action on a contract. We do not propose to take away the right of bringing an action from any person; we propose merely, when his claim to money is on a contract, to allow him to use, if he please, the more simple remedy by motion, instead of an action. The permission to proceed in this way will, we believe, cause motions gradually to take the place of actions for all such claims.' [124]

"The result was the inclusion in the Code of 1849 of certain sections appropriate to this purpose. It was provided that:

'any person entitled to recover money by action on any

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123. P. 589.

124. Report of Revisers, cited in Wilson v. Dawson, 96 Va. 687, 691 (1899). See also Barton, Practice in the Courts of Law in Civil Cases (1877) 333.

contract, may, on motion . . . obtain judgment for such money after sixty days' notice, which notice shall be returned to the clerk's office of such court forty days before the motion is heard.' [125]

"And further that:

'on a motion when issue of fact is joined, and either party desire it, or when, in the opinion of the court it is proper, a jury shall be empaneled, unless the case be one in which the recovery is limited to an amount not greater than twenty dollars, exclusive of interest.' [126]

"In this form the statute remained until 1887, when by the revision of that year the time of notice was cut down to fifteen days with modification, also, of the post-return period, it now being provided that the notice should be returned ten days before the commencement of the term.[127] In 1896, a provision was included extending to this form of proceeding the requirement of an affidavit of merits from the defendant in case of affidavit of claim made by the plaintiff.[128] But by 1912 the remedy had attained such additional growth in favor as to call for a further enlargement of its scope. By a process of amendment beginning in that year, it was made applicable to actions of tort,[129] to actions on contracts not previously falling within its sphere,[130] to actions for statutory penalties [131] and to actions for the recovery of specific personal property or damages in lieu thereof.[132] This movement had its logical outcome in the revision of 1919, by which the remedy became available for common law actions in general through the provision that 'any person entitled to maintain

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125. Va. Code (1849) c. 167, sec. 5.
126. Ibid. sec. 6.
127. Va. Code (1887) sec. 3211.
128. Va. Acts (1896) 140.
129. Va. Acts (1912) 15.
130. Ibid. 651.
131. Ibid.
132. Va. Acts (1916) 760.

an action at law may, in lieu of such action, proceed by motion.' [133]

"After 1887, the proceeding also underwent some re-regulation with respect to its time requirements. Thus, by the amendment of 1896 there ceased to be any appointment of a secondary or post-return period, or any necessity of return in advance of the hearing term: the substituted provision was that the notice should be returned within five days after service and should be docketed upon the lapse of the notice period.[134] And, when in 1912, the remedy was extended to actions of tort, thirty days notice was here prescribed, instead of the usual fifteen.[135] But now, under the revision of 1919 and the further amendment of 1922, the notice-period for all cases of the general proceeding, is one of at least fifteen days and ordinarily not more than ninety days; return of the notice continues to be called for within five days after services; but the cause is now docketed on the return day, that is to say, the day named in the notice for the making of the motion." [136] 38 Yale Law Journal, Summary Civil Procedure, 193, 215.

A good explanation of the reason for the success has been the attitude of the courts as is shown by the article, "Summary Civil Procedure" by Robert Wyness Millar,

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133. Va. Code (1919) sec. 6046. For a fuller account of the amendments leading up to the enactment of this provision, see Revisers' Note to the section in question.

134. Va. Acts (1895-1896) 140; M. P. Burks, Pleading and Practice in Actions at Common Law (1st ed. 1913) 164-165. By the revision of 1887, as above appears, the notice was to be returned ten days before the term. Under the Code of 1849, although this was silent as to the time of the return with relation to the commencement of the term, requiring only that the notice be returned forty days before hearing, it was held that this return had to be in advance of the opening of the term: in other words that the cause had to be "matured for the docket before the term." Hale v. Chamberlain, 13 Gratt. 658 (Va. 1857), as interpreted by Hanks v. Lyons, 92 Va. 30 (1895).

135. Va. Acts (1912) 15.

136. Va. Code (1919) sec. 6046; Va. Acts (1922) 763; Morrissett, **Legislation of 1922** (1922) 8 Va. L. Reg. (N. S.) 81, 97-98. The ninety days maximum may be exceeded where the next term does not commence within ninety days from the date of service.

38 Yale Law Review, 193. We quote from page 219 as follows:

"There can be no doubt that an important element operating in favor of the remedy is the sympathetic consideration which it has received at the hands of the courts from the earliest period of its history. In 1797, speaking with reference to a proceeding by motion instituted by a sheriff against his deputy and the sureties of the latter, to recover execution-moneys not accounted for, Roane, J., said:

" 'I am strongly inclined to view notices with indulgence, seeing that they are the acts not of lawyers but of the parties.' [142]

"This became the settled canon of construction. The foregoing expression was reiterated and expanded in Supervisors v. Dunn (1876) [143] in the following terms:

" 'The rule governing notices is that they are presumed to be the act of the parties and not of lawyers. They are viewed with great indulgence by the courts; . . . if the terms of the notice be general, the court will construe it favorably, and apply it according to the truth of the case, as far as the notice will admit of such application. If it be such that the defendant cannot mistake the object of the motion, it will be sufficient.' [144]

"In the latter case, as in the former, the motion was one under a special statute, but the same doctrine unreservedly obtains wherever the proceeding is used.

" 'A proceeding by motion under Virginia Code (1904) sec. 3211,' said the court in Whitley v. Booker Brick Co. (1912) [145] 'is intended to furnish a simpler, more

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142. Drew v. Anderson, 1 Call. 50, 52 (Va. 1797).

143. 27 Gratt. 608, 612 (Va. 1876).

144. Citing Graves v. Webb, 1 Call. 443 (Va. 1797); Segouine v. Auditor, 4 Munf. 398 (Va. 1815); Steptoe v. Auditor, 3 Rand. 221 (Va. 1825).

145. 113 Va. 434, 436 (1912).

expeditious, and less expensive remedy for the collection of debts than by action, and the same is true of motions generally. Hence, we find that the uniform course of decision in this State has been to view with more leniency and to allow greater laxity in the pleadings in that form of procedure.' [146]

"On the other hand 'this does not relieve the plaintiff of the requirement that he set out in his notice to the defendant matter sufficient to maintain the action, and whether or not he has done this is the sole question raised by the demurrer to the notice.' [147] Nor is it open to the plaintiff to allege one thing and prove another: 'The rule that the allegata and probata must correspond is likewise applicable to proceedings by way of motion.' [148]

"The gain from the use of this proceeding is not confined to its doing away with the formal writ and its simplification of the pleadings. Under the Virginia practice as to terms of court, it enables the plaintiff to move more rapidly than would otherwise be possible.

" 'The second and chief advantage' says the author of the standard work on modern Virginia common law practice, 'is that you may proceed by motion when it is too late to mature a regular action, or even after a term of court has begun, if it shall continue in session long enough for this purpose, as many of the city courts do. It requires two sets of rule days to mature

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146. Accord: Rinehart v. Pirkey, 126 Va. 346, 352 **et seq.** (1919); Shreck v. Va. Hot Springs Co., 140 Va. 429, 432 (1924). But the presumption originally underlying the doctrine seems to have been discarded. "The procedure by notice under section 6046 of the Code is looked upon with great indulgence, not because the notice is supposed to be the act of a layman ignorant of forms of law, for that would be contrary to almost universal experience, but because the courts are loath to sacrifice substance to form and desire, so far as possible, to avoid that result." Per Burks, J., in Mankin v. Aldridge, 127 Va. 761, 767 (1920).

147. Security Loan Co. v. Fields, 110 Va. 827, 829-830 (1910). **Accord:** Matthews v. La Prade, 130 Va. 408, 413 (1921); Wessel v. Bargamin, 137 Va. 701, 707 (1923).

148. Burks, Pleading and Practice, at 170.

a regular action, but you may proceed by motion, as just stated, after either or both sets of rule days have passed, and if there is time enough to give the requisite notice may thus proceed to obtain judgment by motion when it will be too late to obtain it by a regular action.' [149]

"The success of the remedy is plainly attested by the pains recently taken for its extension and improvement, as well as by the numerous cases in the court of review in which the plaintiff has elected to utilize it. That success, moreover, is unqualified. In 1895, when the general proceeding was still confined to actions on contracts, we find it stated by competent authority 'that in plain cases the summary remedy by motion has almost superseded the common law forms of action for the recovery of debts.' [150] Since its extension in 1919, while it has not as yet dislodged the other common law actions to the same degree, it has made constant and increasing inroads upon their province.[151] The probability is, therefore, that in time there will occur in Virginia what has happened on sundry occasions in the history of procedure on the Continent of Europe, namely, that the summary procedure has become the ordinary one.

"But the career of the remedy in Virginia does not tell the whole story. For, with other Virginia institutions, the

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149. Ibid. 168.

150. E. C. Burks, Note to Hanks v. Lyons (1895) 1 Va. L. Rev. 441.

151. "I can confidently say—that the summary proceeding by notice and motion, under the Virginia statute, is popular with the Virginia bar, and that it is much used. It has been more used, certainly, since the remedy has been extended to any action at law. It is more popular with some attorneys than with others, and in some localities than in other localities. I think I can say, however, that whenever an attorney finds that he has a case in which he must draw his declaration with extreme care in order to avoid a troublesome demurrer, he will relieve himself of some of his uneasiness by filing his notice and motion. I think the statute has been altogether beneficial and a great boon to lawyers who desire to avoid the pitfalls of common law pleading." President Prentis of the Supreme Court of Appeals in letter to the present writer, under the date of November 19, 1927 (Mr. Millar).

proceeding by motion found place in the legislation of West Virginia. The latter's first Code, that of 1870, besides putting it at the plaintiff's disposal in sundry single instances, reproduced verbatim the contemporary Virginia provisions with reference to its general use in actions on contracts to recover money. There was added, however, the declaration that 'defense to such motions may be made in the manner and to the same extent as in actions at law.'[152] In 1882, the statute was amended so as to shorten the period of notice and the period which must elapse between the return of notice and the hearing, from the original sixty and forty days, respectively, to thirty and twenty days.[153] By further amendments, adopted in 1915, these periods were again abridged, the former to twenty and the latter to fifteen days, and provision was made for affidavit of claim and affidavit of merits as in the ordinary procedure.[154] Meanwhile, it had been necessary that the notice be returned in advance of the hearing term;[155] but in 1925 this rule was changed and brought into substantial alignment with the later Virginia rule by the provision that the motion 'may be commenced and matured during the term . . . and may be heard at the same term' if this has not expired before the lapse of the notice-period.[156] Thus, the remedy, in West Virginia, apart from special instances, remains limited to cases where the plaintiff 'is entitled to recover money by action on any contract.'[157]

"In dealing with the sufficiency of the notice, the West Virginia courts follow the Virginia doctrine which accords its contents a liberal construction,[158] but contemplates the statement of a good cause of action.[159] Its purpose is said

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152. W. Va. Code (1870) c. 121, secs. 6-8, p. 593.

153. W. Va. Acts (1882) 171.

154. W. Va. Acts (1915) 449.

155. Knox v. Horner, 58 W. Va. 136 (1905); Citizens' Nat. Bank v. Dixon, 94 W. Va. 21 (1923).

156. W. Va. Acts (1925) 283.

157. W. Va. Code Ann. (Barnes, 1923) 2133-2135.

158. Board of Education v. Parsons, 22 W. Va. 308 (1883).

159. Hastings v. Grump, 89 W. Va. 111 (1921); Anderson v. Prince, 60 W. Va. 557 (1906).

to be that of acquainting the defendant with the grounds on which the plaintiff proposes to proceed against him, and 'all that is required in such notice is that it should be so plain that the defendants cannot mistake the objects of the motion, however it may be wanting in form and technical accuracy.'"[160] 38 Yale Law Journal, Summary Civil Procedure, 193, 219, (1928).

Quoting further from page 223 of the same article:

"Concededly, the progress of the remedy has been slower here (in W. Va.) than in Virginia. Not only has legislation in respect of its scope halted with adoption of the Virginia provision of 1849, but even in the case of the contract actions for which it was thus made available, its employment has not been as extensive as in the older States. Nevertheless, this employment is on the increase, and at present approximately half the number of these actions are brought in the summary form. Moreover, since the Virginia amendment of 1919 attempts have been made to obtain here the adoption of a similar statute. In view of the growing favor which attends the remedy, the prospects are that this manner of legislation will not be long deferred. For West Virginia, therefore, it is apparently but a question of time until the remedy attains a success equal to that which it has already achieved in Virginia." 38 Yale Law Journal, Summary Civil Procedure, 193, 223.

This proceeding has also been ably discussed by Charles E. Clark, Dean of the Law School of Yale University and Charles E. Samenow in "The Summary Judgment", 38 Yale Law Review, 423. We quote from page 463 of this article:

"The origin of the summary proceeding by motion for

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160. Shepherd v. Brown, 30 W. Va. 13, 19 (1887). **Accord:** Stuarty v. Carter, 79 W. Va. 92 (1916); People's State Bank v. Jeffries, 99 W. Va. 399 (1925).

judgment has been attributed to Virginia. The use of the procedure against sheriffs and other officers, sureties, attorneys, and on execution bonds began as early as 1732. By 1849, at the time of the adoption of the first of the Codes, sentiment toward widening the scope of the procedure crystallized in its extension to the use of 'any person entitled to recover money by action on any contract.' In 1919, after a number of intermediate steps, it had been made to include within its borders all actions at law.

" 'Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion before any court which would have jurisdiction of such action, after not less than fifteen days' notice, which notice shall be in writing signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court within five days after service of the same . . .

" 'The defendant may make the same defenses to the notice as to a declaration in an action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense.'

"The noteworthy feature of this section is the complete absence of any requirement of formality. Indeed its wording contemplates that the notices be acts of the parties rather than of their attorneys. In spite of the freedom here permitted the notice must state a good cause of action; it must be a notice. Moreover, either party may demand a bill of particulars. The total effect of the provision is a simplification of the pleadings, thus enabling the plaintiff to move much more rapidly than he otherwise could.

"Section 6047 allows the plaintiff to move against a

number of defendants either jointly or severally, or against an intermediate number. 'Such motions may be made from time to time until there is a judgment against every person liable, or his personal representative.' The next section (6048) provides that when an issue of fact is joined and either party desires it or, when in the opinion of the court, it is proper, a jury shall be impaneled.

"The latter part of section 6046 and section 6133 represent a combination of the subjects embraced in the statutes of 1849 and, to a certain extent, the English summary judgment. They apply the procedure specified in section 6046 respectively to actions on account and in assumpsit. As in many other jurisdictions, a number of the cases deal with the sufficiency of the affidavit. This is not, however in this jurisdiction, an indication of an unfavorable attitude of the courts. Indeed the tendency in Virginia seems to be to replace the technical common law forms with this informal motion for judgment." 38 Yale Law Journal, 1928-1929. The Summary Judgment, 423, 463.

This procedure is discussed in the report of the College of Law of West Virginia to the Bar Association, 36 W. Va. Law Quarterly, 5, 70. From page 70 of this article, we quote:

"We have gone to some trouble to study the actual working of the motion procedure in Virginia as applied to all actions at law. The best method seemed to be to send out letters to all the clerks of court, all of the judges, and about fifty representative lawyers for whose selection we are indebted to Mr. Stuart Campbell, a member of the Board of Law Examiners of Virginia. As a result of these statistics the following statements may be made without hesitation.

"(1) The motion for judgment procedure has practically supplanted the common law actions in all classes of actions, both in tort and in contract. The only ex-

ceptions are where there is a special statutory form provided, such as ejectment, and in cases of extraordinary remedy such as mandamus, prohibition, etc. (2) There is a practically unanimous approval of this method of procedure among both bench and bar.

"(3) Although there is an option of pleading common law defenses to the motion, the informal method of defense is becoming used in a majority of counties to the exclusion of the old common law plea.

"(4) The great majority of replies indicate that the informal method of defense is regarded as a quicker and more convenient method of pleading than the old common law pleas . . ." 36 W. Va. Law Quarterly, 70. (1929-1930).

To this article is appended a number of forms suggested for use in these proceedings. These extend from page 83 to page 102. A casual glance at them would show the extent which this form of procedure simplifies pleadings.

WRIT NOT REQUIRED TO COMMENCE ACTION.

A writ issuing from a court is not necessary to commence an action at law. There is nothing in the statutes or constitution requiring a writ issuing from the court to institute an action. In fact for more than two hundred years actions have been instituted in Virginia without such a writ. The due process clause of the United States Constitution does not require it. In at least one case, an appeal was taken to the United States Supreme Court on the ground that the proceeding was instituted by a motion instead of by some other form. The court disposed of this contention without difficulty. In the statement of facts is the following statement:

"A copy of said petition with notice of an intention to apply for an order to show cause why the order and

decree referred to should not be obeyed, was served upon the railway company." Iowa Central Railway Company v. Iowa, 160 U. S. 389, 391; 16 S. Ct. 344; 40 L. Ed. 467.

Mr. Justice White in the opinion disposed of this contention as follows at page 392:

"Indeed, there was no mention of any right thereunder until the filing of a brief for defendant entitled 'Defendant's Resistance and Objection to Plaintiff's Motion to Enter Order Prayed for in the Petition,' in the ninth paragraph whereof it was claimed that it would be a violation of the Fourteenth Amendment of the Constitution of the United States to grant the order prayed for upon the motion in question. It is apparent that this defence merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words."* Iowa Central Railway Co. v. Iowa, 160 U. S. 389, 392-3, 16 S. Ct. 344; 40 L. Ed. 467.

United States Supreme Court has held a judgment may be entered on a rule.

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. Iowa Central Railway v. Iowa, 160 U. S. 389; Wilson v. North Carolina, 169 U. S. 586. . . . The mere fact that the proceeding to hold it liable was by rule, does not conflict with due process under the Fourteenth Amendment, for, as we have seen, forms of procedure in the state courts are not controlled by the Fourteenth Amendment, provided the fundamental rights secured by the amendment are not denied." Louisville & Nashville Rd. Co. v. Schmidt, 177 U. S. 230, 236, 238; 20 S. Ct. 620; 44 L. Ed. 470.

Due process only requires reasonable notice and opportunity to be heard.

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34; Old Wayne Life Association v. McDonough, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, Hovey v. Elliott, 167 U. S. 409; Roller v. Holly, 176 U. S. 398; and see Londoner v. Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods

of trial, and held them to be consistent with due process of law." (Citing 21 U. S. Supreme Court decisions.) Twining v. New Jersey, 211 U. S. 78, 110, 29 S. Ct. 14, 53 L. Ed. 97.

"The fundamental requisite of due process of law is the opportunity to be heard. Louisville & Nashville Ry. Co. v. Schmidt, 177 U. S. 230, 236. Simon v. Craft, 182 U. S. 427, 436. And it is to this end, of course, that the summons or equivalent notice is employed." (This is a dictum.) Grannis v. Ordean, 234 U. S. 385, 394; 34 S. Ct. 779, 58 L. Ed. 1363.

This latter statement was merely a dictum in a case involving an order of publication.

The due process clause of the constitution is concerned with substance, not forms of procedure.

"It has been so often pointed out in the opinions of this court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. Hurtado v. California, 4 S. Ct. 111, 110 U. S. 516, 28 L. Ed. 232; Maxwell v. Dow, 20 S. Ct. 448, 176 U. S. 581, 44 L. Ed. 597; Louisville & Nashville R. Co. v. Schmidt, 20 S. Ct. 620, 177 U. S. 230, 44 L. Ed. 747; West v. Louisiana, supra; Twining v. New Jersey, 29 S. Ct. 14, 211 U. S. 78, 53 L. Ed. 97; Oregon R. R. & N. Co. v. Fairchild, 32 S. Ct. 535, 224 U. S. 510, 56 L. Ed. 863." State of Missouri, ex rel. Hurwitz v. North (1926), 271 U. S. 40, 42, 70 L. Ed. 831, 46 S. Ct. 384, 385.

In Coffin Brothers & Co. v. Bennett, 277 U. S. 29, 72

L. Ed. 468, 48 S. Ct. 422, the court upheld a state law which in the case of stockholders of the state bank authorized issuing of an execution in advance of trial where the debtor had a right to contest the liability after the issuance of the execution. In other words, it held that in that class of cases, the action might be commenced by the issuance of an execution by the state banking commission.

Numerous other United States Supreme Court cases could be cited to show the defendant has no right to any particular form of procedure or writ so long as he is afforded reasonable notice of the case against him and an opportunity to be heard. The notice of motion in this case (R. 1), plainly shows that the defendants had reasonable notice of the claim against them. The rest of the record including particularly the evidence of all defendants except the representatives of deceased defendants (R. 23-50), shows that full opportunity to be heard was given them.

NOTICE OF MOTION UNDER SECTION 6046 NOT A WRIT.

This brings us to the second question, namely, is the notice of motion a writ or process within the meaning of section 721 of the Judicial Code of the United States, which reads as follows:

> "All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a district court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The

seals of said courts shall be provided at the expense of the United States."

or section 106 of the Virginia Constitution which is as follows:

"Writs shall run in the name of the 'Commonwealth of Virginia,' and be attested by the clerks of the several courts. Indictments shall conclude 'against the peace and dignity of the Commonwealth.' "

WRITS AND NOTICES COMPARED.

The notice of motion is not process under section 721 of United States Code or a writ under section 106 of Virginia Constitution. It differs from process as follows:

1. Process is signed by the clerk of the court and the notice of motion by the party or his attorney.

2. Process runs in the name of king, president or state and notice in the name of plaintiff.

3. Process is directed to the marshal, sheriff or other court officer. A notice is directed to the defendant.

4. A process is a court paper from its issuance. A notice is a court paper only when returned to the clerk of the court after being executed.

5. Process must generally be served by an officer. A notice under section 6046 of the Virginia Code is sufficient under section 6041 "which has reached its destination, within the time prescribed by law . . . although not served in the manner above mentioned."

6. Issuance of a process stops the running of the statute of limitations. Only the return of the executed notice to the clerk's office stops the statute. Furts Bros. v. Banks, 101 Va. 208, 42 S. E. 360, Burks Pleading & Practice, 2nd Ed. 232, also 391.

7. Process is a command to the party against whom it

is issued. A notice is not a command but is merely notification of the proposed action of the plaintiff.

That a notice is not a writ or process was held in Kain v. Ashworth, 119 Va. 605, 89 S. E. 857, September 11, 1916.

> ". . . A process emanates from a court and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice which **takes the place of the writ and declaration** is directed to the defendants named therein and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman." Wood v. Kane, 143 Va. 281, 286, 89 S. E. 857. (Sept. 1925). (**Bold face** ours).

PROCEDURE BY NOTICE OF MOTION APPROVED BY FEDERAL COURTS.

This is the usual and proper procedure in the United States district courts in Virginia. The practice in the Eastern District of Virginia and the law is very fully and carefully reviewed by the United States Circuit Court of Appeals in 1935 in the case of Eley v. Gamble, 75 F. (2d) 171, 172. An able and carefully worked out opinion was handed down by Judge Parker, the senior Circuit Judge. We quote at length from this opinion:

> "These are appeals from judgments in favor of the receiver of the First National Bank of Portsmouth, Va., in actions instituted by him to recover on stock assessments made by the Comptroller of the Currency against the stockholders of that bank. All of these actions except three, Nos. 3771, 3774, and 3775, were instituted by notice of motion for judgment pursuant to the Virginia statute, Code of 1930, sec. 6046; and in each of them a plea in abatement was filed on the ground that the notice of motion did not conform to section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) requir-

ing that 'all writs and processes issuing from the courts of the United States' shall be under the seal of the court from which they issue, bear teste of the judge, and be signed by the clerk. In No. 3772 the additional point was raised, by motion to dismiss, that the notice of motion had not been properly served upon the defendant. Nos. 3771, 3774 and 3775 were actions of debt, in each of which a demurrer was filed on the ground that debt would not lie to recover in such case. On the trial there was a motion by the defendant in each case for a directed verdict, on the ground that plaintiff had not proven nonpayment of the stock assessments, or that the defendants owned the stock on which assessments were laid, or were the same persons shown in the books as owners of the stock.

"The appeals in the various cases present the following questions for our consideration: (1) Whether action can be commenced in the federal courts in Virginia by notice of motion under the Virginia statute without compliance with section 911 of the Revised Statutes (28 U. S. C. A., sec. 721); (2) whether service of notice of motion in accordance with the provisions of the Virginia statute is sufficient service to give a federal court in Virginia jurisdiction of the parties in an action so commenced; (3) whether debt is an appropriate form of action for the recovery of a stock assessment; and (4) whether the defendants were entitled to a directed verdict upon any of the grounds mentioned. We think that all of these questions must be answered in favor of the receiver.

"On the first question, it is clear that, as the commencement of an action is a matter of procedure, it is governed by the state practice. 28 U. S. C. A., sec. 724 Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813, 79 L. Ed. 1380, 92 A. L. R. 1193. And here the practice prescribed by the state statute was clearly followed in all of the cases. It is argued that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), which requires all writs and processes issuing from

the courts of the United States to be under the seal of the court and to be signed by the clerk, is applicable to the notice of motion under the statute of Virginia; but the answer to this is that the notice of motion is not a writ or process issuing from the court. The notice takes the place of the writ and declaration under the Virginia practice. Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 109 S. E. 595; Security Loan & Trust Co. v. Fields, 110 Va. 827, 67 S. E. 342; Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487. But it is not process emanating from a court and subject to the restrictive provisions relating to such process. Wood v. Kane, 143 Va. 281, 129 S. E. 327, 329; Kain v. Ashworth, 119 Va. 605, 89 S. E. 857. As said in Wood v. Kane, supra: 'A process emanates from a court, and under the provisions of section 6055 is usually directed to the sheriff of the county, while a notice, which takes the place of the writ and declaration, is directed to the defendants named therein, and has its emanation in the act of the plaintiff in sending it forth, and may be served by a layman.'

"The state of Virginia has seen fit to provide that, in lieu of the procedure followed in actions at law, a party entitled to maintain such action may proceed by motion before any court which would have jurisdiction of the action, upon giving 15 days' notice of the motion to the party against whom relief is asked. Code of Va. of 1930, sec. 6046. There is no reason why the state may not provide for action by the court upon notice of this character; for it is well settled that due process does not require any particular form or method of procedure. It is sufficient if reasonable notice and reasonable opportunity to be heard and to present any claim or defense are afforded; due regard being had to the nature of the proceeding and the character of rights which may be affected by it. State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 82; Iowa Central R. Co. v. State of Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467. And it would largely defeat the purposes of the Uniformity Act if

the courts should hold the procedure under the notice of motion statute inapplicable to actions in the federal court. Letters of the clerk and deputy clerks of the District Court for the Eastern District of Virginia, appended to the brief of appellee, show that 95 per cent of the common-law actions instituted in Richmond in recent years, 33 1/3 per cent of those instituted at Norfolk, and 14 per cent of those instituted at Alexandria, have been commenced by notice of motion. 'The object of the statute was to simplify and shorten pleadings and other proceedings, to afford a more speedy remedy for the enforcement of contracts, and give suitors a plain and summary proceeding for the recovery of judgments.' Burk's Pleading & Practice (2d Ed.) 222. The members of the bar have made wide use of the practice which it prescribes, and there is no reason why it should not be followed in the federal courts in accordance with the mandate of the Conformity Act.

"The late Judge McDowell went into this matter very fully in Leas & McVitty v. Merriman (C. C.) 132 F. 510, holding that the state practice established by the notice of motion of judgment statute should be followed under the Conformity Act and that section 911 of the Revised Statutes (28 U. S. C. A., sec. 721) was not applicable. The opinion in this case fixed the practice which has been followed in the federal courts of Virginia for more than 30 years; and we need do no more than refer to the opinion as a clear exposition of the law applicable in the premises. It has been followed by Judge McDowell in Schofield v. Palmer (C. C.) 134 F. 754; and by Judge (later Mr. Justice) Sanford In re Condemnation Suits by United States (D. C.) 234 F. 443, 448, and cited with approval by the Circuit Court of Appeals of the Ninth Circuit in Perris Irr. Dist. v. Turnbull, 215 F. 562, 564. In the Condemnation Suits Case in 234 F. 443, 445, Judge Sanford was dealing with proceedings in condemnation in which the owners of land were brought before the court by service of notice, and by publication as to nonresidents,

as allowed by the Statutes of Tennessee. It was objected that, because of the requirement of section 911 of the Revised Statutes (28 U. S. C. A., sec. 721), the proceeding should have been commenced by summons issued under the seal of the court and signed by the clerk. In upholding the proceedings under the Tennessee statute and holding that section 911 had no application, Judge Sanford said:

"'I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court, itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the Federal courts embodied in section 911 of the Revised Statutes (28 U. S. C. A., sec. 721). Martin v. Criscuola, 10 Blatchf. 211, 16 Fed. Cas. 892 (No. 9,159); Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. 71 (No. 10,884); Dwight v. Merritt (C. C.) 4 F. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 F. 252, 253.

"'After careful consideration, however, I conclude that the provisions of section 911 only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may properly be instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 have no application.'" Eley v. Gamble, 75 Fed. (2d) 171, 172, 173.

OTHER FEDERAL CASES.

Prior to 1904 there were four circuit court decisions and one district court decision to the effect that process must conform to section 721 of the United States Code. The

latest of these was decided in 1884, 19 Fed. 252. Since the decision of Judge McDowell in Leas & McVitty v. Merriman, 1904, 132 Fed. 510, these old cases do not appear to have been applied to private notices, or followed anywhere.

In 1904 this question was raised before Judge McDowell, a distinguished judge of the Western District of Virginia. Judge McDowell handed down a carefully considered opinion, September 22, 1904, which has been since followed and approved. As the entire opinion is devoted exclusively to the one point before us, it is hard to do much less than copy the decision in this case. There was a proceeding by notice of motion under section 3211 of the Code of 1887, now section 6046:

". . . Upon the calling of the case the defendant's counsel moved that the motion be dismissed on the ground that the notice was not under the seal of the court and not signed by the clerk of the court. The argument is based on section 911, Rev. St. (U. S. Comp. 1901, p. 683) (section 721 U. S. Code):

" 'All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from . . . a Circuit Court shall bear teste of the Chief Justice . . .'

"The question thus raised is in this state of much practical importance. Not only are there many such motion cases, but by section 2732 (now 5461) of the Code of Virginia of 1887 actions of ejectment may be instituted only by a notice given the defendant, to which is attached a copy of the declaration, advising him when and where the declaration will be filed. The practice under this statute has always been that the plaintiff's attorney prepares, signs, and has served the notice, whether the action is brought in the state courts or in the federal courts in this state. There is

no rule of this court bearing on the question. Were it not for some decisions to be adverted to later I should feel justified in overruling this motion without discussing the question. The language used in section 911 (now 721), Rev. St., seems to me to show clearly that it has no relation to such a case as is here presented. However, because of the decisions above mentioned, it is perhaps advisable to enter upon a discussion of the question." . . .

Here Judge McDowell refers to the older cases upon the subject.

"I have reached the conclusion that section 911 does not apply here and for the following reasons:

"(1) On its face this statute applies only to writs and processes issuing from the federal courts. In no sense do the notices we have under consideration 'issue' from the court. The ground for the motion by defendant in the case at bar is highly technical, and could properly be met by a somewhat technical reason for overruling it. But I am not satisfied that this reason is only technical. If the language of this statute can be rightly held to apply to the notices here in question, it could also be held to apply to all the various notices given in the course of litigation in the federal courts. The statute is, most properly, not confined to documents which are used merely to institute a litigation.

"(2) I think section 911 (721), Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than that when a writ or process issues from a federal court it must be signed by the clerk, and shall be authenticated in the manner therein set out. It is not an ordinance to the effect that no action or proceedings in a federal court shall be instituted except by the issue of process, signed by the clerk, duly sealed, etc.

"(3) Notices in ejectment under section 2732, Code Va. 1887, and notices of motion for judgment under sec-

tion 3211 are not, as it seems to me, 'processes.' To my mind, the word 'process,' as used in Rev. St. sec. 911 (721), means an order of court, although it may be issued by the clerk. The summons in a common-law action, which is, I think, a 'process,' in the name of the court commands the sheriff or marshal to summon the defendant, etc. Johnston's Forms, p. 1. The writs of scire facias, fieri facias, habeas corpus, subpoenas for witnesses, subpoenas duces tecum, writs of certiorari, supersedeas, attachments, and of venire facias are all commands or orders of court that something be done. In equity the writ of subpoena, and in criminal cases the bench warrant, command that something be done. Now, the notices under the Code are in no sense commands or orders of court. They are mere notices that the plaintiff will on some specified rule day file the declaration, or make a motion in court. They sometimes are, and may always be prepared, signed, and issued by the plaintiff in person. No rule of practice requires that an attorney shall sign or issue them. They do, it is true, subserve the purposes of processes. But they are not technically processes, and are not necessarily embraced within that term as used in section 911 (721).

"In several of the states a summons in an action may be issued by the plaintiff's attorney. See 19 Am. & Eng. Ency. (1st Ed.) p. 222, notes and cases cited supra. And in at least the majority of such States it is held that a summons is not a process. This conclusion is based on the fact that in such states the summons is not issued by the court, and is not an order of court. If such reasoning have any soundness, it applies much more forcibly to the notices we are considering.

"In Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857, it is said:

" 'Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under our Code the

summons is a process to commence a civil action. But technically, such a summons is not a "process" but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. In view of this distinction, such notice cannot be considered process in the sense in which that word is used in the books.'

"(4) If we read into section 911 (721), Rev. St. a requirement that notices in ejectment and of motions for judgment are to be treated as processes to be issued by the clerk under seal, we have created a repugnance between sections 911 (721) and 914 (724), Rev. St. This is to be avoided. If one of two reasonable readings of the statute law creates, and the other avoids, a repugnance, the latter should be adopted.

"(5) While the language above quoted from Shephard v. Adams, 168 U. S. 618, 624, 18 Sup. Ct. 214, 216, 42 L. Ed. 602, seems prima facie to indicate that a paper serving the purpose of process from the federal court must always conform to section 911 (721), Rev. St., still the entire opinion is somewhat in confirmation of the opposite conclusion. It seems to give much weight to section 914 (724), Rev. St., and the inference is that, where there is no rule of the federal court on the subject a state statute authorizing a summons to be issued by plaintiff's attorney would control in the federal court. The prototype of section 911 (721) was enacted in 1789 (Act Sept. 29, 1789, c. 21; 1 Stat. 93. See also, Act May 8, 1792, c. 36; 1 Stat. 276); the conformity act (section 914 (724)) at a much later date (Act June 1, 1872, c. 255, 17 Stat. 197). The purpose of this later statute was to secure conformity in civil law causes, subject to a reasonable discretion in the federal courts, in matters of practice, pleading, and 'forms and modes of proceeding.' Where the state statute authorizes the plaintiff or the plaintiff's attorney to issue not a summons, but a notice, as a method of instituting a litigation, reasonably full effect is de-

nied the conformity statute, if we hark back to act of 1789 for authority for saying that such state statute does not govern in common-law civil causes in the federal courts of such state, in the absence of any rule of court on the subject.

"The motion of defendant is overruled." Leas & McVitty v. Merriman, 132 Fed. 510.

This case has never been overruled or disapproved by any court so far as we can find.

It was followed in Schofield v. Palmer, 134 Fed. 753; In Re: Condemnation Suits, 234 Fed. 443 and Eley v. Gamble, 75 F. (2d) 171. Cited with approval In Re: Pieris Irr. Dist. v. Turnbull, 215 Fed. 562 and In Re: Simon, 297 Fed. 942.

The notice of motion statute in Virginia has been construed on several occasions by the courts of this district and by the Circuit Court of Appeals of this district. See New River Mineral Company v. Roanoke Coal & Coke Co., 49 C. C. A. 78, 110 Fed. 343; Schoefield v. Palmer, 134 Fed. 753; Shugart v. Crews, 171 C. C. A. 72, 260 Fed. 36.

This decision of Judge McDowell has been relied on by the bench and bar in the State of Virginia for thirty years. To question it at this time would be to throw doubt upon the validity of probably more than fifty per cent of the recent judgments by default in the federal courts of Virginia.

It would also in effect so far as Virginia is concerned nullify the Conformity Act, section 724, because the lawyers of Virginia are familiar with the procedure by notice of motion and habitually use it. The fundamental purpose of 724 is to permit lawyers in the State to use the procedure with which they are familiar.

In a number of condemnation proceedings in the East-

ern District of Tennessee under section 724, they gave notice as provided by the state practice. Objection was made that they were void because process was not issued signed by the clerk and under the seal of the court. Judge Sanford, later Justice of the Supreme Court, said:

> "In several proceedings instituted by the United States and now pending in this court for condemnation of lands under the provisions of the Weeks Law of March 1, 1911, c. 186, 36 Stat. 961 (Comp. St. 1913, sec. 5174-5187), the United States Attorney and various counsel representing claimants to the land have informally requested the opinion of the court as to the validity of the proceedings, arising out of a doubt which has been suggested as the jurisdiction of the court by reason of the fact that no summons have been issued and served upon the owners of the land, but they have been brought before the court, if at all, by mere service of notice and publication as to nonresidents, in accordance with the provisions of the general statutes of Tennessee in reference to condemnation proceedings.
>
> "(1) The Act of August 1, 1888, c. 728, 25 St. 357, authorizing the condemnation of land by the United States for public uses by condemnation under judicial process is proceedings in the Circuit or District Courts of the district wherein such real estate is located, provided, in section 2, that:
>
> " 'The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding.'
>
> "This provision as to conformity to the State practice is, it is to be noted, in substantially the same terms as the provisions of the general conformity statute, embodied in section 914 of the Revised Statutes (Comp. St. 1913, sec. 1537).

"The general statute of Tennessee in reference to the condemnation of land for railroads and other works of internal improvement, provide that the party seeking to appropriate such land shall file a petition therefor in the circuit court of the county in which the land lies (Tenn. Code 1858, sec. 1326; Shan. sec. 1845); that notice of this petition shall be given to the owner of the land, or if a nonresident of the county, to his agent, at least five days before its presentation (Code 1858, sec. 1327; Shan. sec. 1846); that if the owner is a nonresident of the state or unknown, notice shall be given by publication, as provided in the Code in similar cases in Chancery (Code, sec. 1328; Shan. sec. 1847); and that 'all parties having any interest in any way in such land may be made defendants, and the proceedings will only cover and affect the interest of those who are actually made parties.' (Code, sec. 1329; Shan. sec. 1848). This statute makes no provision for bringing the owners of the land before the court in any other way than by notice and publication, as above set forth, and does not provide for the issuance of process against them in the ordinary sense, such proceedings being under the State law an exception, by necessary inference, to the general statutory provision that all civil actions at law in courts of record, except as otherwise provided, shall be commenced by summons. Tenn. Code, Sec. 2813; Shan. sec. 4518. Thus in Camp v. Railroad, 11 Lea (Tenn.) 705, 706, it was held that condemnation proceedings based alone upon the statutory notice, without summons, were valid, and that the general Code provisions as to pleadings in actions at law did not apply to such statutory proceedings.

"The doubt which has been suggested as to the validity of these proceedings arises from the fact that section 911 (721) of the Revised Statutes (Comp. St. 1913, sec. 1534) provides that 'all writs and process issued from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof;' the suggestion being

that under this provision these proceedings should have been commenced by summons to the owners of the land, issued under the seal of the court and signed by the clerk.

"I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the federal courts embodied in section 911 (721) of the Revised Statutes. Martin v. Criscuola, 10 Blatchf. 211, 16 Fed. Cas. 892; Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. 71; Dwight v. Merritt (C. C.) 4 Fed. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 Fed. 252, 253.

Preceding paragraph alone is quoted by petitioner, p. 16.

"After careful consideration, however, I conclude that the provisions of section 911 (721) only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may be properly instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 (721) have no application. This is in accordance with the principle of Leas v. Merriman (C. C.) 132 Fed. 510, in which it was held that the provisions of sec. 911 (721) did not apply to a notice given under the Virginia Code authorizing a judgment on a contract to be obtained on motion after notice to the defendant and the practice thereunder by which notice was served on the defendant by the plaintiff or his attorney, such no-

tice not being a process from the court, and that under the general conformity statute an action might be instituted by such notice in the Federal court in Virginia in accordance with the State practice." In Re, Condemnation Suits by United States, Eastern District of Tenn. March 30, 1916; 234 Fed. 443.

We quote the syllabus of an earlier case:

"Process—What Constitutes—Notice of the Garnishment. Rev. St. sec. 915 gives plaintiff, in common law causes in the United States Circuit Court remedies by attachment or other process against the defendant's property, similar to those provided by the state statutes. Code Iowa sec. 2962, provides that the clerk shall issue the writ of attachment. Sec. 2967 provides that property of the defendant held by a third person may be attached by giving the latter notice of attachment. Sec. 2975 as amended by Laws 18th General Assembly, c. 58, provides that garnishment is effected by informing the supposed debtor that he is attached as garnishee, and leaving written notice not to pay any sum due, or deliver the property to defendant, etc., there is no provision in the Revised Statutes or Iowa Code requiring either of such notices to proceed from the clerk. Held, that a notice to the garnishee is not a 'process' within Rev. St. sec. 911, relating to process, and that such notice in actions in the United States Circuit Court in Iowa is properly signed by the marshal, and need not bear the seal of such court or the teste of the chief justice of the United States." Wile v. Cohn (1894), 63 Fed. 759 (Syllabus Cir. Ct. Iowa). Affirmed by the Circuit Court of Appeals, 70 Fed. 138, but without discussing the validity of garnishee summons. That point apparently was not raised in the Circuit Court of Appeals.

THIS PROCEDURE IN FEDERAL COURTS APPROVED BY TEXT WRITERS.

"Under the conformity act (Rev. Stat., sec. 914; U. S. Comp. Stat. 1901, p. 684) an action may be instituted

by notice under sec. 6046 in a Federal Court in Virginia in accordance with the State practice." Burks Pleading & Practice, Second Edition, p. 226.

"Interesting questions sometimes arise as to what is process within the meaning of this federal statute. Thus, is notice of motion for judgment, a practice obtaining in Virginia and many other states, process in this sense, so that it must conform to the federal statutory requirements? Judge McDowell, in a well considered opinion that is believed to be sound, has answered this question in the negative. And the same has been held as to notice given by the parties of the commencement of a proceeding for the condemnation of land." Dobie on Federal Procedure, p. 592.

"Action may be instituted by such notice (under Virginia Code, section 6046) in a Federal Court in Virginia in accordance with State practice." 4 Cyc. of Fed. Procedure, sec. 1203.

"Process included in the phrase 'modes of proceeding' used in the Conformity Act, and in the statute requiring that all writs and processes issuing from the federal courts shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, in its narrowest sense means the writs and mandates of the court under the seal of the court, and so does not include mere notices of the parties given by the parties." 6 Hughes Fed. Practice 106, sec. 3584.

"Those (process) issuing from the Supreme Court must bear teste of Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence; and those issuing from the District Court bear teste of the judge, or when that office is vacant, of the clerk thereof. They must be signed by the clerk of the court, from which they issue. In this connection 'process' means the writ and mandate under the seal of the court, and does not refer to notices given by the parties, which are not the court's process." 6 Hughes Fed. Practice 325, sec. 3787.

STATE CASES HOLDING NOTICES NOT WRITS.

There are numerous state decisions that statutory and constitutional provisions which require process to be signed and sealed by the clerk or issued in the name of the state such as U. S. Code, sec. 721 and Va. Constitution, sec. 106 and have no application whatever to citations or notices given by parties or their attorneys similar to those given under section 6046 of Virginia Code. Some of the state decisions are as follows:

"A summons is not a process—it is a mere statutory notice. Rahn v. Cunnison, 12 Wis. 528. The summons in this case was regular, in every way except for not being signed by Wisconsin attorneys with their address specified." Hammond-Chandler Lumber Co. v. Industrial Commission (1916) 158 N. W. 292, 294, 163 Wis. 596.

"As to the first point raised that the summons is such a process as must be issued in the name of the people of the State of Colorado, we are strongly inclined to follow the conclusion of the supreme court of Florida in Gilmer v. Byrd, 15 Fla. 411. In this case the identical question here presented is discussed at some length — that is, that the summons, as authorized by the Code is a 'process' within the meaning of the constitutional provisions which require the style of all process to be the 'State of Florida;' that the summons had no style; that this was essential to the validity of the judgment, there having been no appearance. And the Court said: 'But is a notice given by an attorney of the institution of a suit in a form similar to a summons but not issuing out of a court, a "process" within the meaning of the constitution?' Baron Comyn in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process' given by any accepted authority which implies that any writ or method by which a

suit is commenced is necessarily 'process.' A party is entitled to notice and to a hearing under the constitution before he can be affected but it is nowhere declared or required that that notice shall be only a writ issuing out of a court. 'In Porter v. Vandercook, 11 Wis. 70, it was held that "the summons provided for by the Code is not a 'writ' or 'process' within the meaning of the constitution, art. 7, sec. 17," and need not be in the "name of Wisconsin" nor tested in the name of the presiding judge, nor sealed with the seal of the court.' In Hanna v. Russell, 12 Minn. 80 (Gil. 43) the Court said: 'But we think a "summons" is not "process" with the meaning of sec. 14, art. 6 of our State Constitution. It is merely a notice given by plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fail to defend. This notice is not issued out of or under the seal of the court, or by authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it "process" for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complainant without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him.' Bailey v. Williams, 6 Or. 71, it was held that 'a summons used to bring a defendant into the circuit court is not "process" and need not run in the name of the state.' In Nichols v. Plank Road Co., 4 G. Greene, 44, it was held that 'the notice provided by the Code is not a "process" and need not be in the style of the "State of Iowa."' This seems to be the generally accepted conclusion of all courts having a similar Code practice and a similar provision in the constitution, and is, in our judgment a satisfactory determination of this question." Comet Consolidated Min. Co. v. Frost (1890) 25 Pac. 506, 507, 15 Colo. 310.

"A summons issued by the plaintiff or his attorney in an action instituted in a court of record in Oregon is

not a 'process' within the meaning of that word as used in our Code. L. O. L. sec. 1368; Bailey v. Williams, 6 Or. 71; Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857, 862.

"The cases thus relied upon are not controlling in Oregon where a summons issued in an action instituted in a court of record is not process, nor more than a mere notice to the defendant upon whom it is served." Lane v. Ball (1916) 160 Pac. 144, 148, 149, 83 Or. 404 (Sup. Ct. Ore. 1916).

"Two other questions are urged by respondents (a) that the Court did not acquire jurisdiction; and (b) that the notice was insufficient.

"As to the first it was urged that since the notice to respondents did not run in the name of the State of Washington, and that by Article 4, sec. 27 of the State Constitution, all process is required to be in the name of the State of Washington the notice was ineffectual to give jurisdiction. An elaborate argument on this point is pressed upon us to show that the notice herein is process within the meaning of the Constitution. But we think it unnecessary to enter into a review of the question, since we have heretofore held that a summons in a civil action is not process, and we think the notice given herein stands on no higher plane. Wagnitz v. Ritter, 31 Wash. 343, 71 Pac. 1035; Spokane Merchants Assn. v. Acord, 99 Wash. 674, 170 Pac. 329, 6 A. L. R. 835; St. ex rel. Hazen v. Superior Court (Wash.) 247 Pac. 942." State v. Superior Ct., 253 Pac. 115, 119, 142 Wash. 270 (1927).

"Besides, citation is not 'process' within the intendment of said article of the Constitution. Bludworth v. Sompeyrac, 3 Mart. (O. S.) 719." Herndon v. Wakefield-Moore Realty Co., 79 So. 318, 319 (1918) 143 La. 724.

Note: This was the commencement of a condemnation proceeding where it was claimed the citation did not conform to the requirements for process.

"In some States the original summons to the defendant in an action is a mere notice by the plaintiff's attorney; and hence is not process in the sense of constitutional or statutory provisions prescribing the style and requisites of process.

"But we think a summons is not process within the meaning of section 17, art. 3, of our State Constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted, and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court, or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it process, for it is competent for the Legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process, in a large acceptation, is nearly synonymous with proceedings, and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn's Dig. 120; 3 Black. Com. 279 et seq.; Bouvier's Law Dic. In this last sense it is manifestly used in the Constitution and, when used in this sense, we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same.' Hanna et al. v. Russell et al., 12 Minn. 80 (Gil. 43). The meaning of the Constitution of Illinois, which provides that all process shall run in the name of 'The People of the state of Illinois,' is thus explained. 'This object is manifest. It was to provide a name or title by which the sovereign power of the state should be designated. In England the king is supposed to be the fountain of justice and the source of power, and that sovereign power is there designated by his name and title. In Kentucky, and some of the other states, it is the 'commonwealth,'

in Missouri and some others it is the 'State.' Here it is the 'People,' etc. Where, by the law of England, whence we have mainly borrowed our system of jurisprudence, writs or process are issued, or other proceedings are had expressly in the name of the king, here they should run in the name of 'The People.' The latter is to be used instead of the former. The meaning is not that everything shall be done expressly in the name of 'The People' but that nothing shall be done in any other name. Whenever the name of the sovereign power is invoked or expressed, that shall be its designation.' Curry v. Hinman, 11 Ill. 420. See also, Leas & McVitty v. Merriman (C. C.) 132 Fed. 510; Gilmer v. Bird, 15 Fla. 410; William Tweed v. Horace Metcalf, 4 Mich. 579; Case Mfg. Co. v. Perkins, 106 Mich. 349, 64 N. W. 201; Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124; Brooks v. Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Bailey v. Williams, 6 Or. 71; Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; Porter v. Vandercook and others, 11 Wis. 70." McKenna v. Cooper, 101 Pac. 662, 663, 79 Kan. 847 (1909).

"In this case the identical question here presented is discussed at some length—that is, 'that the summons, as authorized by the Code, is a 'process,' within the meaning of the constitutional provisions which require the style of all process to be, the 'State of Florida;' that the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance,' and the court said: 'But is a notice given by an attorney of the institution of a suit, in a form similar to a summons, but not issuing out of a court, a 'process' within the meaning of the constitution? Baron Comyn, in giving the definition of the term 'process' says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of 'process' given by any accepted authority, which implies that any writ or method by which a suit is commenced is

necessarily 'process.' A party is entitled to notice and to a hearing, under the constitution, before he can be affected, but it nowhere declared or required that the notice shall be only a writ issuing out of a court. Mining Co. v. Frost, 25 Pac. 506; Hanna v. Russell, 12 Minn. 80 (Gil. 43); Bailey v. Williams, 6 Or. 71; Nickols v. Plank-Road Co., 4 G. Greene, 44." Brooks v. Nevada Nickel Syndicate (1898) 53 Pac. 597, 599, 24 Nev. 264.

"As was stated at the outset, this summons was signed by the attorney, as permitted by the statute, and thereby F. C. Erdman was given notice of the pendency of the suit. The notice accomplished its purpose, and brought the right man into court, who moved to quash it. There is no question concerning the right to amend a writ because a summons signed by an attorney is not a process, but a notice under the code, or a proceeding, as perhaps it might be more accurately termed, whereby the person who is named as a defendant is brought into court to defend the action. Mining Co. v. Frost, 15 Colo. 310, 25 Pac. 506." Erdman et al. v. Hardesty, 60 Pac. 360, 361, 14 Colo. App. 395 (1900).

"Writs are issued by the court through the clerk. Orders to show cause, under our practice, are signed by the judge. This order was signed by the judge. The practice in this state has long been established, and justifies the initiations of the proceeding through an order to show cause of the character of the one here involved. Such orders to show cause have been issued repeatedly by this court in various special proceedings, and have, so far as we are aware, never run in the name or style of the state of North Dakota. When writs have been issued, they have been issued by the clerk upon the order of the court; but orders to show cause have invariably been signed by a member of the court. It is true the order to show cause often contains some of the same provisions found in an alternative writ, but ordinarily an order to show cause is only another name for a notice and another method of submitting a

motion; and section 7825, supra, clearly contemplates the application being made upon notice, when a peremptory writ is sought in the first instance. Such notice may be given by means of the simple notice signed by counsel, or through the agency of an order to show cause, issued by the court or a judge. This is a combined notice and motion. The works on the subject all seem to contemplate application for the writ, either by notice or by order to show cause, and none of the approved forms of an order to show cause that we find contain the greeting which respondent contends is essential to jurisdiction. See the title 'Writ of Prohibition,' 14 Enc. of Forms, 987; Writ of Mandamus, 13 Enc. of Forms, 767, 13 Enc. of Pl. & Pr. 767." No. Pac. Ry. Co. v. Jurgenson (1913) 141 N. W. 70, 71, 25 N. D. 14.

"It is contended the published order for constructive process is void because it did not run in the name of the state of Florida.

"Section 37 of article 5 of the Constitution, providing that, 'The style of all process shall be the State of Florida' and section 4230 (2590). Compiled General Laws of Florida 1927, providing that, 'All process shall run in the name of the State of Florida,' have reference to 'process' as used in the restricted sense, and have reference only to that character of process which under the common law would run in the name of the king, and have no application to statutes providing for constructive service in chancery. Burns v. Pittsburg Mortg. Inv. Co., 105 Okla. 150, 231 Pac. 887; McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662; Herndon v. Wakefield-Moore Realty Co., 143 La. 724, 79 So. 318; Curry v. Hinman, 11 Ill. 420; In re Abraham Bininger, 7 Blatchf. 262, text 274 (2d Cir.) Gilmer v. Bird, 15 Fla. 410; 20 Ency. Pl. & Pr. 1116." Gautier Properties v. The Biscayne Trust Co. (1930) 129 So. 848, 849.

"Again, it is contended that both the Missouri and Kansas divorces are void because the publication notices

did not run in the name of the state. The same contention was made in McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662, but not sustained. That decision is adhered to. The same rule appears to prevail in Missouri. Hansford v. Hansford, 34 Mo. App. 262. See also, Doan et al. v. Boley et al., 38 Mo. 449." Gordon v. Munn (1912), 125 Pac. 1, 3, 87 Kan. 642.

"But we think a summons is not process within the meaning of section 14, article 6 of our state constitution. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it process, for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him. 'Process' in a large acceptation, is nearly synonymous with 'proceedings,' and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. 7 Comyn, Dig. 120; 3 Bl. Comm. 279 et seq.; Bouvier, Law Dict. In this last sense it is manifestly used in the constitution, and when used in this sense we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same. A summons, in our practice, therefore, we think, is not, in a strict or proper sense, or in the sense in which the word is used in the constitution, process." Hanna v. Russell, 12 Minn. Rep. 43, 45 (1882).

"It is further contended that the notice is void for the reason that it does not run in the name of the state of Oklahoma. Section 19, art. 7, of the Constitution pro-

vides that 'The style of all writs and processes shall be "The State of Oklahoma." Section 862, Comp. Laws 1921, provides: "The style of all process shall be the 'The State of Oklahoma,' " etc. But manifestly, process as used in the Constitution and statute is in the restricted sense, and has reference only to that character of process which under the common law would run in the name of the king. 20 Ency. Pl. & Pr.; McKenna et ux v. Cooper, 79 Kan. 847, 101 P. 662." Burns v. Pittsburg Mortgage Inv. Co. (1924) 231 Pac. 887, 889, 105 Okla. 150.

"Section 9 of the Declaration of Rights, contained in the Constitution of this State, provides that no person, shall be deprived of life, liberty or property without due process of law. Section 2 of Article 6 of the Constitution provides that 'the style of all process shall be "The State of Florida." The term, process, as used in these two sections, has not the same signification. In the first it is used in a large and comprehensive sense. In the second it is used in its most restricted and limited sense. Says Baron Comyn, "Process, in a large acceptance, comprehends the whole proceeding after the original and before judgment, but generally it imports the writs which issue out of any court to bring the party to answer, or for doing execution and all process out of the King's courts, ought to be in the name of the King. It is called process because it proceeds or goes out upon former matter, either original or judicial."' . . .

"This clause does not prohibit the Legislature from establishing a general rule of practice by which notice of the institution of an action may be given by an attorney or party. It has never received such a construction by the courts. Where such an enactment is general and applies to all actions and to all individuals, as is the case of the Code, such notice by an attorney is in conformity to the law of the land, and a judgment depriving a party of his property after such notice is, in contemplation of law, a deprivation by

due process of law. Whether the notice given by the attorney be process or not, it is, for the reasons given, within the power of the Legislature so far as this clause is a limitation, to authorize notice to be given in this manner. . . .

"But is a notice given by an attorney of the institution of a suit in a form similar to a summons, but not issuing out of a court, a process within the meaning of the Constitution? Baron Comyn, in giving the definition of the term process, says it imports the writs which issue out of any court to bring the party to answer or for doing execution. There is no definition of process given by any accepted authority which implies that any writ, or method by which a suit is commenced is necessarily process. A party is entitled to notice and to a hearing under the Constitution before he can be affected, but it is nowhere declared or required that that notice shall be only a writ issuing out of a court.

"In the States in which has existed a Code similar to the one under which this action was brought, we find the courts of last resort holding that such notice or summons need not be entitled or styled in the name of the State, although the constitutional requirement is substantially the same as ours in regulating the style of process. 12 Wis. 529; 4 Iowa 43; 4 Mich. 588; 3 Penn. 99; 12 Min. 86." Gilmer v. Bird, 15 Fla. 410, 421, 422, 423 (1875).

"It is objected that the court refused to dismiss the proceedings on the ground of defective notice. The first defect urged is that the notice does not run in the name of the state of Iowa, as required by the Constitution. This court has decided in former cases that the notice provided by the Code is not a 'process,' as contemplated by the Constitution, and that it need not be in 'the style' of 'the State of Iowa.'" Nichols v. Burlington and Louisa County Plank Road Co. (1853) 5 Iowa (4 Greene) 42, 43.

"The action was commenced in June, 1859. The summons was signed by the respondent's attorney, and required the appellants to answer within twenty days, etc. The objections taken to the summons were: That it does not run in the name of 'The State of Wisconsin;' is not sealed with the seal of the court; is not properly tested in the name of the presiding judge; and does not give the appellants ninety days to answer, but requires them to answer within twenty days.

"When the nature and office of a summons are considered, as indicated by the code of procedure, which code is incorporated in, and becomes a part of our present Revised Statutes, we are clearly of the opinion that it cannot properly be said to be a 'writ' or 'process,' within the meaning of chapter 136, Revised Statutes, and of section 17, article VII, of the Constitution. And it is quite evident that the legislature must have taken the same view of the matter, not regarding a summons as a 'writ' or 'process' within the constitutional meaning of those terms, or it would not have passed the sections of chapter 124 relating to it; for by the provisions of that chapter, it is expressly declared that an action may be commenced by service of summons with or without seal, which summons shall be subscribed by the plaintiff or his attorney, etc. It is not required to be issued out of a court of record, to be sealed with the seal of the court, and tested in the name of the presiding judge, as the writs contemplated by chapter 136, must be." Porter v. Vandercook et als. (1860) 11 Wis. 70.

"On the same day that the petition was filed in the district court the court ordered the publication of the notice required by section 5 of the act, hereinbefore quoted. The notice was duly published. It was not given in the name of the people and this fact gave rise to the second contention of plaintiff, namely, that the notice is a 'process' within the meaning of section 30 of Article 6 of the Constitution of the State of Colorado which provides that 'all process shall run in the

name of the "People of the State of Colorado,'" and that therefore the notice was void. This contention cannot be sustained, for we hold that the notice in question was not a 'process' within the meaning of the constitutional provision cited, and was not, therefore vitiated by the fact that it did not run in the name of the People." (Here follow authorities to sustain the holding). People v. Lee, 213 Pac. 583, 586, 72 Colo. 598.

"In further support of the contention that county court 'process' should be served in the same manner as district court process, plaintiffs cite section 1086, C. O. S. 1921, which provides: 'All process issued by the county court shall be served in the same manner, and by the persons and officers as provided for the service of process of the district court with the same fees.' Is service of such an order service of 'process,' and is there a distinction between 'process' and notice required in probate proceedings? Section 862, C. O. S. 1921, provides: 'The style of all process shall be: "'The State of Oklahoma.'" It shall be under the seal of the court from whence the same shall issue, shall be signed by the Clerk, and dated the day it is issued.' A guardian's sale is a special proceeding under articles 7 and 8, chapter 5 C. O. S. 1921, (sections 1232-1305) and is not a cause of action under sec. 172, C. O. S. 1921. The orders of the court on a hearing of a petition in a sale proceeding are not required to run in the name of the state; they are not required to be under the seal of the court; and they are not required to be signed by the clerk." Harrison v. Orwig, 299 Pac. 143, 147 (Sup. Ct. Okla. 1931).

"This is an appeal from an order of the district court of Carter county reviving a judgment theretofore rendered against the plaintiff in error in favor of the defendant in error. Hereinafter the plaintiff in error will be referred to as the defendant and the defendant in error as the plaintiff.

"(1) The first assignment of error is that the trial court

erred in overruling the defendant's motion to quash the notice. The only objection made to that notice is that it did not run in the name of the State of Oklahoma.

"Section 19, article 7, of the Constitution of Oklahoma, provides '. . . The style of all writs and processes shall be " 'The State of Oklahoma' . . .'"

"Section 19, O. S. 1931, provides: 'The style of all process shall be " 'The state of Oklahoma' ". It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it is issued.'

"The notice complained of is not a writ or process within the meaning of section 19, art. 7, of the Constitution, or section 19, O. S. 1931. Burns v. Pittsburg Mortgage Inv. Co., 105 Okl. 150, 231 P. 887; Harmon v. Nofire et al, 131 Okl. 1, 267 P. 650; Emerson v. Emerson, 130 Okl. 140, 265 P. 1078; and Armstrong v. Phillips, et al., 82 Okl. 82, 198 P. 499. When a sufficient notice was duly served on the defendant by the sheriff, the court acquired jurisdiction. Section 263, O. S. 1931; section 578, O. S. 1931." Dunlap v. Bull Head Oil Co., 29 Pac. Rep. (2d) 108, 109. (Supreme Court of Oklahoma, 1934).

"In summary proceedings by notice and motion against Bank debtors, the notice serves the double purpose of a writ and declaration, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed." Stanley v. Bank of Mobile, 23 Ala. 652 (2nd paragraph of syllabus).

CONFORMITY ACT CONTROLS PROCEDURE.

This point is well expressed by Mr. Justice Roberts in the recent case of Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813, where he said on page 492:

"The Conformity Act required the trial court to apply

the local law in matters of procedure. The form of action and the right in which it must be brought were therefore governed by the Pennsylvania practice."

Petitioners in their behalf, pages 6-10, argue that the Conformity Act does not apply. They cite cases holding that where the federal law creates a new cause of action and prescribes a new and wholly statutory procedure to enforce it, and gives exclusive jurisdiction to the federal courts the Conformity Act does not apply. Coffey v. U. S., 117 U. S., p. 233, 68 S. Ct. 717, 29 L. Ed. 849, cited by petitioners is a case involving an in rem proceeding, to enforce the forfeiture of property for violation of the revenue law. The court held that the Conformity Act applied only to in personam proceedings, and not to in rem proceedings. U. S. v. The Southern Dredging Company, 251 Federal 400, referred to a proceeding within the exclusive jurisdiction of the federal court and it was "a wholly statutory procedure."

Dwight v. Merrit, 4 Fed. 614, merely held that a summons must be signed and sealed by the clerk of the court. Aetna Insurance Company v. Hallock (Aetna Insurance Co. v. Doe), 6 Wallace 556, 18 L. Ed. 948, held that an order of foreclosure of sale in a state court void for not conforming to the State statute.

Middleton Paper Company v. Rock River Paper Co., 19 Fed. 252, held that a garnishment summons cannot be signed by the attorney.

U. S., etc. v. Bolt Harbor Marine Railway Company, Inc., 58 Fed. 2d, 366, held that the Conformity Act did not apply where jurisdiction was given exclusively to the federal court. This case was decided by Judge Way, who presided in the district court at the trial of this action. He saw no conflict between the decision in this case and the ruling in that. U. S. v. Moore, 287 Fed., p. 879,

was a contempt proceeding arising in bankruptcy. The court held that as the state courts had no jurisdiction in bankruptcy matters, the Conformity Act did not apply. The sole question discussed in the circuit court of appeals was whether a habeas corpus or a petition to review was proper. Habeas corpus had been brought and the court held it was the wrong form of procedure.

U. S. v. 50 Boxes, etc., of Lace, 92 Fed. 601, was a proceeding to forfeit under the federal law of which the federal courts had exclusive jurisdiction. It was a quasi criminal in its nature. Held the Conformity Act did not apply.

No case, state or federal, has been cited by petitioners or found by us, holding that the state courts are without jurisdiction to enforce an assessment levied on national bank stock by the Comptroller of Currency. Such actions have been repeatedly brought in the state courts for many years.

Matteson v. Dent, 176 U. S. 521, 20 S. Ct. 419, 442, was such an action originally brought in the State Court of Ramsey County, Minnesota, and afterwards heard by the Supreme Court of Minnesota, 70 Minn. 519, and finally taken up to the United States Supreme Court. The jurisdiction of the state court appears not to have been questioned.

The jurisdiction of the state court was questioned in the case of McCormick v. Smith, 23 Ida. 487, 130 Pac. 999. It was there expressly held the state courts had concurrent jurisdiction with the federal courts in the enforcement of such liability.

The following were actions in state courts to enforce such liability:

O'Conner v. Witherby, 111 Cal. 523, 44 P. 227; Hale v. Walker, 31 Iowa 344; Davis v. Essex Baptist Society,

44 Con. 582; Laing v. Burley, 101 Ill. 591; Graham v. Platt, 65 P. 30, 28 Colo. 421; Cox v. Elmendorf, 37 S. W. 387, 97 Tenn. 518; Clark v. Ogilvie, 63 S. W. 429, 111 Ky. 181; Kerr v. Urie, 37 A. 789, 86 Md. 72; McGruder v. Colston, 44 Md. 349; Aspey v. Whittemore, 85 N. E. 91, 199 Mass. 65; Davis Estate v. Watkins, 76 N. W. 575, 56 Neb. 288; King v. Armstrong, 34 N. E. 163, 50 Ohio State 222; First National Bank v. Riggins, 32 S. E. 801, 124 N. C. 534; Schaberg's Estate v. McDonald, 83 N. W. 737, 64 Neb. 493.

Where the federal law creates a cause of action and does not limit such actions to the federal courts, it can be enforced in state courts.

"Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. Robb v. Connolly, 111 U. S. 624, 637.

"On the contrary, the absence of such provision would

be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court as well as in those of the United States." Galveston H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481, 490, 32 S. Ct. 205, 56 L. Ed. 516.

"Congress created the right of action. (Carmack Amend.) It might have provided that the right shall be enforceable only in a federal court. It might have provided that state courts shall have concurrent jurisdiction only of those cases which, by the applicable federal law, could, under the same circumstances, have been commenced in a federal court for the particular state. But Congress did neither of these things. It dealt solely with the substantive law. As it made no provision concerning the remedy, the federal and state courts have concurrent jurisdiction. Galveston, etc. Ry. Co. v. Wallace, 223 U. S. 481, 490, 32 S. Ct. 205, 56 L. Ed. 516. The federal right is enforceable in a state court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws. Second Employers' Liability Cases, 223 U. S. 1, 56, 57, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Claflin v. Houseman, 93 U. S. 130, 136, 137, 23 L. Ed. 833." State of Missouri, etc. v. Taylor, 266 U. S. 200, 208, 45 S. Ct. 48, 45 S. Ct. 47.

No case has been cited by petitioners, or found by us, holding that the Conformity Act does not apply to an action at law to enforce a stock assessment.

DISCUSSION OF PETITIONERS' POSITION AND AUTHORITIES.

Section I, pages 6 to 10 of their brief discussing the Conformity Act is replied to on pages 50 to 53 of this brief.

Section II, pages 10 to 11, is irrelevant because it deals

with matters other than the jurisdiction of the District Court to which the certiorari limited the appeal.

Section III, pages 11 to 17, where it is argued that a notice of motion for judgment is a writ or process, we will discuss in detail.

We take issue with the first statement of this section. We have seen no case and no case is cited by the petitioners holding that a notice of motion issued and signed solely by the plaintiff for the purpose of instituting an action in a district court of the United States is process within the meaning of Section 721 of Title 28 of the United States Code and to be valid has to be under the seal of the district court signed by the clerk and bear the teste of the district judge.

The complaint, motion, declaration or other statement of the plaintiffs' cause of action against the defendant, is as far as we know, always signed by the plaintiff or his attorney. The Virginia Code (Section 6046), and that of some of the other states provides for service of this motion for judgment, with a named date when judgment will be taken, unless the defendant oppose the motion. This sort of a motion, with a notice of the date when the motion for judgment will be made, has never by any federal court been held to be a process under Section 721, nor to be a writ or process under Section 106 of the Virginia Constitution, or like section of any other state constitution.

We will now review petitioners' authorities on this subject.

We have been unable to locate Rose's Code of Federal Procedure. There is certainly nothing about the Virginia practice in the quotation. It relates solely to a summons or process. Whether in some other section there is a discussion of the Virginia practice of moving for a judg-

ment we have been unable to determine or whether this quotation is from the latest edition.

The case of Peaslee v. Haberstro, Federal Case No. 10884, was decided by the New York District Court in 1879, without citation of authority. The form of the summons used in that case is not given. It was certainly not a notice of motion.

Dwight v. Merrit (Cir. Ct. N. Y. 1880), 4 Fed. 614, the paper discussed was a summons and not a notice of motion. The court merely followed the earlier case of Peaslee v. Haberstro.

Johnson v. Healy, Federal Case No. 7389 (N. Y. D. C. 1878), held a summons signed by the clerk good, the court saying:

> "The Supreme Court of the United States in construing the provision of Section 914 of the Revised Statutes—Section 5, Act June 1, 1872, (17 Stat. 197)—in Indianapolis R. Co. v. Horst, 93 U. S. 291, say that the conformity required by the statute is required to be 'as near as may be' not 'as near as possible' or as 'near as may be practicable', and that 'this indefiniteness' devolves on the judges the duty of construing and deciding and gives them the power to reject any subordinate provision in the State statute 'which in their judgment would unwisely encumber the administration of law or tend to defeat the ends of justice in their tribunals.' Unquestionably, where a process or pleading is substantially in compliance with the requirements of the Code of the state, especially where to set it aside would tend to defeat the ends of justice, it ought to be upheld. Lewis v. Gould, Case No. 8324."

U. S. v. Mitchell, 223 Fed. 805 (N. Y. Dist. Ct. 1915), involved not the validity of the summons—that was merely brought in by way of dictum—but the entire case turned on the validity of the service of the summons, which was

not served by the marshal. This was the only point in the case.

Middleton Paper Co. v. Rock Paper Co., 19 Fed. 252 (Wis. C. C. 1884), held that a garnishee summons could not be signed by the attorney. It is in conflict with the opinion of Wile v. Cohn (1894), 63 Fed. 759. See page 35 of this brief.

In Re: Condemnation Suits, 234 Fed. 443. The quotation in that case is incomplete and in its incomplete form it is misleading. A fuller quotation is given on pages 32 to 34 of our brief and shows the case to be very favorable to our contention.

Cooper v. Reynolds, 10 Wall. 308, Boswell v. Otis, 9 How. 336, and Pennoyer v. Neff, 95 U. S. 714, have no bearing on the subject.

It will be observed that petitioners have no cases, even apparently on this subject, except four from the circuit and district Courts of New York and Wisconsin, and that the latest decision is in 1884, twenty years before the decision of Judge McDowell in Lees & McVitty v. Merriman, 132 Fed. 510, which is the leading case of the federal authorities on which we rely.

The first of these cases, Peaslee v. Haberstro did not examine the statutes carefully. It assumed that a summons or process returned to a court was the same as one issuing from a court. This is a very important distinction because Section 721 has nothing to say about notices or anything else which may be substituted for process and returned to court. It applies entirely to processes issuing from the courts. This distinction has not only been observed in the subsequent cases but it had been brought out many years before in the state cases. This case entirely ignored such earlier cases as Gilmer v. Bird, 15 Fla. 410 (1875); Nichols v. Burlington & Louisa County

Plank Road, 5 Iowa (4 Greene) 42, (1853); Porter v. Vandercook, 11 Wis. 70 (1860), and others. See pages 37 to 49 of this brief.

The three remaining cases, all district and circuit court decisions blindly followed this or each other, in no way referring to the numerous earlier State cases and wholly failing to observe that Section 721 was confined to process issuing from courts and like the sections in the state constitution had no application to notices returnable to courts.

These four cases do not appear since 1884 to have been followed anywhere. If they have been referred to it has usually been to distinguish them. They were mentioned in a dictum, in U. S. v. Mitchell, 223 Fed. 805, by the New York District Court in 1915.

Much of the administration in federal courts is regularly based on notices which are not process. Hughes Federal Practice gives many forms to be signed by the plaintiff or his attorney and addressed to the defendant or his attorney which are presumably serviceable by the marshal. He says that proof of service may be by the marshal's return, Vol 12, Section 8447. Among his sections are the following: 8147, 8427, 8428, 8453, 8461, 8463, 8468, 8469, 10075, 10366, 10419, 10511, 11100, 11101, 11102, 12511, 12589, 12706, 13243, 13524, 13545, 14822, 16732, 16733, 18093, 18233.

Petitioners' title "Notice of Motion Is Process." The first authority cited under this is Hughes Federal Procedure (2d). This is the old one volume Horn Book Issue. It has been revised, enlarged and corrected in his latest edition, 6 Hughes Fed. Practice 325, Sec. 3787. Petitioners were evidently familiar with this work, for the next quotation is from the latest 16 volume edition. This second quotation from Section 3584 is incomplete.

It should have included that part of the section quoted on page 36 of our brief, to the effect that Section 721 does not apply to notices of the parties given by the parties.

The last case cited, Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 109 S. E. 595, holds that the notice of motion is not a writ, but takes the place of a writ and declaration.

Title IV of petitioners' brief, pages 19 and 20, contends that as Section 503 of Title 28 does not require the marshal to serve a notice of motion, his service is void. There is certainly no citation of authorities to show that it was illegal for the marshal to serve the notice. There is also no citation of authorities to show that it was necessary for the marshal to serve the notice. Virginia Code, Section 6041 provides that a notice which has reached its destination in time, though not served is good. U. S. v. Mitchell, 223 Fed. 805 quoted from on page 15 of petitioners' brief, held that process not served by the marshal was valid in a federal court under the Conformity Act, if served in accordance with a state practice. In that case the Court said "But no federal statute requires that all process shall be directed to the marshal."

Appendix. Why the Rule of Practice in the Eastern District was copied at page 20 we do not know. Judge Luther B. Way, who wrote the rule held that it did not prevent the use of the notice of motion in this case. This construction of the Rule was approved by the Circuit Court of Appeals in this case and in Eley v. Gamble, 75 Fed. (2d) 171, Section 724 of Title 28. The Conformity Act, after providing for conformity reads: "Any rule of court to the contrary notwithstanding."

CONCLUSION.

The writ was inadvertently awarded as to T. S. Winston and should be dismissed as to him and execution is-

sued against him and his surety, John R. Morris forthwith.

It is also respectfully submitted that under the Conformity Act it was proper to file a proceeding by notice of motion, that the notice not being a writ issuing out of court does not have to be signed or sealed by the clerk as writs issuing out of a court have to be under section 721 of the Judicial Code of the United States. The decisions of the District and Circuit Court of Appeals were right and should be affirmed.

Respectfully submitted,

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"Remedy by motion after fifteen days' notice, in lieu of action at law; when notice to be returned to clerk's office; rules applicable to . . . Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion, before any court which would have jurisdiction of such action, after not less than fifteen days' notice, which notice shall be in writing, signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court, within five days after service of same, and when so returned shall be forthwith filed and the date noted thereon, and shall be docketed on the return day thereof. But the notice shall not be sent out of the county or city in which the judgment is to be asked, except in those cases in which process can be so sent out under the provisions of section six thousand and fifty-five and six thousand and fifty-six. The return day of a notice under this section shall not be more than ninety days from its date, unless the commencement of the next succeeding term of court be more than ninety days from such date, in which case the return day may be some day of such term.

"The defendant may make the same defenses to the notices, as to a declaration in any action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense. An action shall be deemed brought on the day on which such notice is executed, if such notice be subsequently returned to the clerk's office to which same is returnable, within the time herein prescribed, and the execution thereof shall stop the running of the statute of limitations on the claim mentioned therein.

"If the motion be upon an account the plaintiff shall file with the notice an account, stating distinctly the several items of his claim, unless they be plainly described in the notice, and if the plaintiff file with such account an affidavit, such as is prescribed by section sixty-one hundred and thirty-three, on the part of the plaintiff in an action of assumpsit, no plea in bar or defense to the merits shall be received on the part of the defendant, unless accompanied by such affidavit as is prescribed by the last-mentioned section on the part of the defendant in an action of assumpsit. If such plea and affidavit be not filed by the defendant, the plaintiff shall, upon motion made in open court, be entitled to a judgment for the amount claimed in the affidavit filed with his notice, and no further proof of the plaintiff's claim shall be necessary. If such plea of defense and affidavit be filed and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

"Upon any motion under this section the same rules shall apply, with reference to bills of particulars and grounds of defense, as are now provided by law in other actions or motions.

"In the event the return day of any notice given under the provision of this section, should happen to be a day of the term on which the court did not sit, or a day after the final adjournment of a term, such notice shall not be lost, but shall be deemed matured for hearing on the first day thereafter of the same term on which the court sits or the first day of the next regular term of the said court, as the case may be, and shall be docketed on that day by the clerk." Virginia Code, section 6046.

CONFORMITY ACT

Section 724, Title 28, U. S. C.—Conformity to practice in State courts.—The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (R. S. Sec.